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IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

LEEDS LP, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. 08-cv-0100-BTM-BLM REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS CLAIM ONE OF THE FIRST AMENDED COMPLAINT Date: May 16, 2008 Time 10:00 a.m. Location: Courtroom 15 NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

The United States' Memorandum in support of its Motion to Dismiss Claim One of the First Amended Complaint explained why Plaintiff cannot bring a wrongful levy action under 26 U.S.C. § 7426(a)(1) to challenge a federal tax lien encumbering real property. The United States relied on two Supreme Court cases, EC Term of Years Trust v. United States, 127 S. Ct. 1763, 1765, 1768 (2007); United States v. Williams, 514 U.S. 527, 536 (1995), which addressed the distinction between a lien and a levy and the various statutory remedies available to parties seeking to challenge a tax lien or levy.

Plaintiff's Opposition ("Pl.'s Opp'n") attempts to distinguish these cases and suggests that they support its position. See Pl.'s Opp'n at 7-8. Nevertheless, no amount of calibration can change the Supreme Court's view of what Williams held: "Although we decided that § 1346(a)(1) authorizes a tax refund claim by a third party whose property was subjected to an allegedly wrongful tax lien, *we so held on the specific understanding that no other remedy, not even a timely claim under § 7426(a)(1), was open to the plaintiff in that case.*" EC Term of Years Trust, 127 S. Ct. at 1768 (emphasis added).

Plaintiff, like the Williams plaintiff, seeks to challenge "an allegedly wrongful tax lien." Id.; see First Amended Complaint ¶¶ 11-12. The factual difference between these two cases is that the Williams plaintiff was forced to pay off the tax lien before bringing suit because she had entered a contract to sell the property without actual knowledge of the lien. See 514 U.S. at 530 (noting that "[o]ne week before the closing, the Government gave actual notice to Williams and the purchaser of over $41,000 in tax liens which, it claimed, were valid against the property or proceeds of the sale[, and] the purchaser threatened to sue Williams if the sale did not go through on schedule"). Even in this situation, the Court stated that the plaintiff could not recover amounts paid to the Internal Revenue Service ("IRS") in a wrongful levy situation because no levy had occurred. See id. at 536. In this case, no property has been seized, and no amounts have been paid by, or collected from, Plaintiff to satisfy the tax lien on the property—thus, any distinction to be drawn based on the facts of Williams and this case does not favor Plaintiff. Under Williams and EC Term of Years Trust, Plaintiff cannot challenge an allegedly wrongful tax lien under § 7426(a)(1).[1]

Furthermore, while Plaintiff devotes several pages to argue it would lack a meaningful remedy absent a claim under § 7426(a)(1), it fails to acknowledge Claim Two of the First Amended Complaint, a quiet title claim under 28 U.S.C. § 2410. Section 2410(a) allows a claim "to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." Plaintiff has already pled the meaningful remedy it claims would be deprived by the dismissal of Claim One, and to the extent Plaintiff's Opposition asserts that it otherwise lacks a remedy against the IRS, it is simply wrong.

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[1] The suggestion that the wrongful levy action is proper because the IRS did not notify Plaintiff within thirty days that its administrative claim was "inadequate," pursuant to a Treasury regulation, is wholly without merit. See Pl.'s Opp'n at 10. The claim was denied because there was no property seized and nothing to return, not because it was procedurally inadequate. See id., Ex. A.

Plaintiff concedes that the United States has not seized—*i.e.*, does not have possession of—the real property that is the subject of this action. Pl.'s Opp'n at 6-7 (acknowledging the "fact that the Government has not physically 'seized' the property"). Under Williams and EC Term of Years Trust, this Court lacks subject matter jurisdiction over Claim One for wrongful levy under § 7426(a)(1).

DATED this 9th day of May, 2008.

Respectfully submitted,

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/s/ Justin S. Kim
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Attorneys for the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following: William P. Shannahan, wpshan@sbcglobal.net; and I hereby certify that I have mailed by U.S. Postal Service the foregoing to the following non CM/ECF participants: none.

/s/ Justin S. Kim
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